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JOSEPH F. SPANIOL, JR.
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No. 90-295

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

BILLY J. TEMPLE,
Petitioner,
v.

SYNTHES, LTD. (U.S.A.),
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Petition, which consists of nothing more than a complaint about a discretionary joinder ruling under Federal Rule of Civil Procedure 19(a) and a discretionary dismissal with prejudice ruling for failure to comply with an order of the Trial Court under Federal Rule of Civil Procedure 41(b), presents any "special and important reasons" in accordance with Rule 17 of the Supreme Court.

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STATEMENT OF THE CASE

The petitioner, Billy J. Temple, a resident of the State of Mississippi, instituted claims for bodily injury damages in September of 1987 by filing a Louisiana state court proceeding against Louisiana residents, Dr. S. Henry LaRocca and St. Charles General Hospital, and by filing a United States District Court, Eastern District of Louisiana proceeding against Synthes, Ltd. (U.S.A.), a Pennsylvania resident. The same damages were claimed in the state court proceeding and in the federal court proceeding.

At status conferences that took place in the federal court proceeding between late 1987 and early 1989, the petitioner, through his attorney, repeatedly told the District Judge that he intended to join Dr. LaRocca and St. Charles General Hospital as defendants in federal court as soon as the state court administrative proceedings were concluded. For over 15 months, the District Judge and all parties including the petitioner, Temple, the respondent, Synthes, and the state court parties, Dr. LaRocca and St. Charles General Hospital, monitored the state administrative proceedings and participated in joint discovery.

After the state administrative proceedings were concluded, the petitioner suddenly refused to name Dr. LaRocca and St. Charles General Hospital as federal court defendants. The attorney for petitioner then announced to the District Judge that he wanted to pursue the same damages against the defendants in two separate courts at the same time (despite the fact that adding Dr. LaRocca and St. Charles General was feasible and that diversity jurisdiction would not be destroyed by their joinder).

The District Judge thereafter ruled on a motion by Synthes that Dr. LaRocca and St. Charles General Hospital were indeed parties needed for a just adjudication under Federal Rule of Civil Procedure 19. Because joinder was feasible and diversity would not be destroyed, the District Judge ordered the petitioner to join Dr. LaRocca and St. Charles General Hospital as defendants within twenty days or have his case dismissed. The petitioner failed to comply with the order of the District Judge and the District Judge thereafter dismissed the federal court complaint with prejudice for failure to comply with an order of court as permitted by Rule 41(b) of the Federal Rules of Civil Procedure.

Petitioner appealed to the United States Court of Appeals for the Fifth Circuit and the judgment of the Dis-

trict Court was affirmed in a *per curiam* opinion. Thereafter petitioner sought a rehearing which was denied by the Fifth Circuit, again in a *per curiam* ruling. Finally, petitioner filed a motion to recall mandate and to extend the time for seeking a rehearing *en banc*, and both motions were denied by Judge Williams of the Fifth Circuit.

Petitioner now seeks a writ of certiorari from the Supreme Court, and Synthes opposes the petition on the grounds that the rulings complained of are discretionary rulings which were properly made under the Federal Rules of Civil Procedure. As such, the Petition for Writ of Certiorari should be denied because the petitioner does not purport to present any of the "special and important reasons" which govern review by the United States Supreme Court on writs of certiorari.

ARGUMENT

Throughout the proceedings below, and throughout his brief submitted with his petition to the Supreme Court, the petitioner has failed to recognize that the order of dismissal by the district court was properly made, because under Rule 19 the District Judge properly found that Dr. LaRocca and St. Charles General Hospital were parties needed for a just adjudication of the claim of the petitioner, and because it was feasible to join Dr. LaRocca and St. Charles General Hospital. The Rule 19 decision of the District Judge, therefore, found that there were "parties needed for a just adjudication" and that the parties could be joined so the District Judge entered the following order:

"Accordingly, IT IS ORDERED that plaintiff be given twenty (20) days within which to join Dr. S. Henry LaRocca and St. Charles General Hospital as parties in this action pursuant to the provisions of Federal Rule of Civil Procedure 19. If plaintiffs fail to join said parties within the time prescribed, the Clerk of Court is hereby directed to enter final

judgment, dismissing plaintiffs action with prejudice." (See Petition for Writ of Certiorari, Appendix E).

When the petitioner thereafter failed to comply with the above order, the District Judge executed the following judgment:

"Counsel for plaintiff, having failed to comply with the Court's Order dated and filed herein on: July 24, 1989, accordingly;

"IT IS ORDERED, ADJUDGED, AND DECREED, that there be judgment in favor of defendant Synthes Corporation (Synthes Ltd. (U.S.A.) and against plaintiff Billy J. Temple, dismissing plaintiff's complaint with prejudice, plaintiff to bear all costs. (See Petition for Writ of Certiorari Appendix D (emphasis added)).

The finding that Dr. LaRocca and St. Charles General Hospital were parties needed for a just adjudication under Rule 19 is well supported by the principles of *Provident Tradesman Bank and Trust Co. v. Patterson*, 88 S. Ct. 733, 390 U.S. 102, 19 L. Ed. 2d 936 (1968) in which this Court said:

"First, the plaintiff has an interest in having a forum . . . second, the defendant may properly wish to avoid multiple litigation, or inconsistent relief, or sole responsibility for a liability he shares with another . . . third there is an interest of an outsider whom it would have been desirable to join . . . fourth, there remains the interest of the Courts and the public in complete, consistent, and efficient settlement of controversies. (88 S.Ct. at 738-739, 390 U.S. at 109-111, 19 L. Ed. 2d at 945-946)."

The rationale of the *Provident Tradesman Bank and Trust Co.* case has been followed in many cases since 1968. (See e.g. *Pultizer—Polster v. Pultizer*, 784 F. 2d 1035 (5th Cir. 1986); *Broussard v. Columbia Gulf Transmission Co.*, 398 F. 2d 885 (5th Cir. 1988); *Morrison v. New Orleans Public Service, Inc.*, 415 F. 2d 419

(5th Cir. 1969); and *Schutten v. Shell Oil Co.*, 421 F. 2d 869 (5th Cir. 1970).

Inasmuch as the decision under Rule 19 is a discretionary decision by the Trial Judge which is amply supported by the facts of this case and the law as stated by *Provident Tradesman Bank and Trust Co. v. Patterson*, supra, and its progeny, the decision under Rule 19 presents no "special and important reasons" for review by this Court.

Moreover, because the actual dismissal with prejudice came after the plaintiff violated the order of the Trial Judge, the plaintiff has no cause to complain because Rule 41(b) of the Federal Rules of Civil Procedure allows such dismissals. Rule 41(b) provides:

"Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of Court, a defendant may move for a dismissal of an action or of any claim against him . . . Unless the Court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of prosecution, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits." (Emphasis added).

As stated by the Fifth Circuit, the dismissal under Rule 41(b) by the Trial Judge was proper. In *English v. Seaboard Coastline R. Co.*, 465 F. 2d 43 (5th Cir. 1972) the Fifth Circuit explained:

"When the Court decides under Rule 19(a) that a person should be joined, the Court should direct the plaintiff to amend his complaint to add the person. Failure to comply with such an order may result in dismissal of plaintiff's action under Rule 41 (b) F.R.C.P. for failure of a party to comply with an order of Court." 465 F.2d at 47-48) (emphasis added).

Because the complaint of petitioner to this Court concerns a discretionary dismissal "with prejudice" which is permitted under Rule 41(b), the petitioner has again failed to set forth any "special and important reasons" for review by this Court. The ruling below that is being complained of in this case is a discretionary ruling for a dismissal with prejudice because of the violation of an order of Court under Rule 41(b). In *Goforth v. Owens*, 766 F. 2d 1533 (11th Cir. 1985) the Court said:

"A district court is authorized on defendant's motion, to dismiss an action for failure to prosecute or to obey a Court order or federal rule. F.R. Civ. P. 41(b). The Court's power to dismiss as an inherent aspect of its authority to enforce its orders and insure prompt disposition of lawsuits." *Link v. Wabash Railroad Co.*, 370 U.S. 626, 630-31, 82 S. Ct. 1386, 1388-89, 8 L.Ed. 2d 734 (1962); *Jones v. Graham*, 709 F. 2d 1457, 1458 (11th Cir. 1983). (766 F. 2d at 1535) (emphasis added).

Because the circumstances leading up to the dismissal of this case were caused and created solely by the actions of plaintiff himself, and because the District Judge was within his discretion in making a Rule 19 decision finding Dr. LaRocca and St Charles General Hospital as parties who could feasibly be joined, and because the plaintiff thereafter decided to ignore the order of the Trial Judge, the dismissal under Rule 41(b) was itself proper. Inasmuch as all of the decisions below are authorized by the Federal Rules of Civil Procedures, the Petition for a Writ of Certiorari in this case should be denied.

CONCLUSION

This is a case where petitioner represented, for over 18 months, that he would add more parties as defendants who should be parties and whose joinder would not destroy diversity. After 18 months, petitioner changed his mind and defied all suggestions of the Trial Court to add the parties. On a timely filed motion by respondent, the Trial Judge thereafter held that the additional parties were indeed parties needed for a just adjudication under Rule 19(a) of the Federal Rules of Civil Procedures and that it was feasible to join them under Rule 19(a). Appellant was ordered by the Trial Judge to add them as defendants within twenty days or have the case dismissed with prejudice. Petitioner continued his refusal to comply with the order of the Trial Judge. The Trial Judge thereafter dismissed the suit with prejudice for violation of the order of Court under Rule 41(b) of the Federal Rules of Civil Procedure. The decision of the Trial Judge has been upheld by a three Judge panel of the Fifth Circuit which affirmed the rulings below in an original opinion, an opinion on rehearing, and in an order denying a motion to recall mandate.

The petitioner has sought a writ of certiorari, but under Rule 17 of this Court, there are no "special important reasons" for review by this Court. Respondent, Synthes, Ltd. (U.S.A.), respectfully submits that the decision under Rule 19(a) was proper (*Provident Tradesman Bank and Trust Co. v. Patterson*, 88 S. Ct. 733, 390 U.S. 102, 19 L. Ed. 2d 936 (1968); *Prestenback v. Employer's Insurance Co.*, 47 F.R.D. 163 (E.D. La. 1969); *Pultizer-Polster v. Pultizer*, 784 F. 2d 1935 (5th Cir. 1986). Moreover, Synthes, Ltd. (U.S.A.) further respectfully submits that the dismissal under Rule 41(b) was also proper. (*English v. Seaboard Coastline R. Co.*, 465 F. 2d 43 (5th Cir. 1972); *Goforth v. Owens*, 766 F. 2d 1533 (11th Cir. 1985)).

Because of the discretionary and appropriate nature of the ruling below, Synthes, Ltd. (U.S.A.) respectfully submits that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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